BAD FAITH EXPERT TESTIMONY IN COVERAGE LITIGATION

By Jay M. Levin and Julia Fradkin

Most lawyers trying bad faith cases want to introduce expert testimony to support their claims or defenses. Under *Daubert,* however, "bad faith" expert testimony is not always admitted. This article addresses when this type of testimony will be admitted and when it will be limited or excluded.

***Daubert* motions in property insurance bad faith cases.** The Federal Rules of Evidence govern the admissibility of expert opinions in federal cases. Rule 702 provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if certain conditions are met. The burden is on the proponent of expert testimony to prove its admissibility by a preponderance of the evidence. In deciding a motion to exclude expert testimony, the trial judge acts as a "gatekeeper" to determine whether the proffered testimony is relevant, reliable, and helpful to the trier of fact.

The three factors that courts consider are: (1) qualifications, (2) reliability, and (3) fit. With regard to qualifications, an expert must be qualified by "specialized expertise," which is liberally interpreted to include "a broad range of knowledge, skills, and training." In addition to these three factors, courts also consider whether the expert is trying to opine on the ultimate legal conclusion.

> THE ADMISSIBILITY OF EXPERTS' TESTIMONY MAY DEPEND ON HOW THEY EXPRESS THEIR OPINION.

When proffering bad faith experts in property insurance litigation, practitioners must be careful to select experts who are qualified and able to testify generally about the customs and practices of insurance companies in reaching coverage decisions or amount of loss. The expert must also be able to testify about the ways in which the insurance company *in this particular action* fell short of or complied with industry custom and/or practice.

Qualifications for experts in insurance bad faith cases. It appears that the question of expert qualification in the context of claims handling and bad faith experts is largely based on the type and length of the expert's experience. While the experience need not be of the same type in every case, the expert's experience must adequately inform his or her understanding of the industry's customs and practices.

For example, the Ninth Circuit Court of Appeals in *Hangarter v. Provident Life & Accident Insurance Co.,* 373 F.3d 998, 1015–16 (9th Cir. 2004), a case involving an insurer's discontinuation of disability benefits, held that an expert with 25 years of experience working for insurance companies and as an independent consultant qualified him to testify about claims adjustment standards and practices. This expert had been found qualified to testify on insurance practices and standards within the industry 12 times before and had never been found unqualified.

In *Geico Casualty Co. v. Beauford,* No. 8:05-cv-697-T-24EAJ, 2007 WL 2412974, at *3–5 (M.D. Fla. Aug. 21, 2007), a Florida federal district court permitted the insured's proffered "insurance industry expert" to testify as an expert in, among other things, "insurance bad faith in Florida and any related issue of claims adjuster handling." The insurer

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attempted to exclude the expert's testimony for lack of qualifications, but the court sided with the insured, who had highlighted the expert's almost 30 years of training, experience, and knowledge in the handling of insurance claims.

In sharp contrast, where an expert's qualification in one field is only "vaguely related" to another field, the court may hold that the expert is not qualified in the second field. For example, in *California Shoppers, Inc. v. Royal Globe Insurance Co.*, 221 Cal. Rptr. 171, 208 (Ct. App. 1985), an action against an insurance company based on its failure to defend its insured in a third-party action, the California appellate court held that the trial court erred in permitting an attorney to testify as an expert on the subject of insurance company practices. Although he was "a highly qualified trial attorney," the court found that he lacked any special knowledge, skill, experience, training, or education in the area of insurance company practices.

Are custom and practice experts helpful to the jury? Expert testimony is not necessarily required in bad faith actions against insurers, and thus the admissibility of such testimony is often challenged as not necessary and not helpful to the jury. The admissibility of expert testimony on insurer bad faith is within the discretion of the trial judge, and whether it will be admitted often depends on the complexity of the issues in question. Accordingly, depending on the circumstances, courts sometimes exclude bad faith expert testimony if the fact finder already possesses the required expertise. On the other hand, bad faith expert testimony is permitted where the claims involve complex or highly technical insurance issues.

Whether custom and practice experts may opine on ultimate issue. Even where an expert is permitted to testify on the issue of insurance bad faith, most courts will preclude testimony that is really a legal conclusion, and many will preclude testimony on the ultimate legal issue of whether the insurer acted in bad faith.

In *Smith v. Allstate*, 912 F. Supp. 2d 242 (W.D. Pa. 2012), the court excluded an expert's report on insurance bad faith where the report contained legal conclusions. For example, the report concluded that the insurer and its employees acted in bad faith in handling the insured's claim. The court found that this conclusion was inappropriate expert testimony because "[i]t is well-settled that expert opinion on the ultimate legal issue of whether a defendant acted in bad faith is inadmissible."

In *Fidelity National Financial, Inc. v. National Union Fire Insurance Co. of Pittsburg, PA*, No. 09-CV-140-GPC-KSC, 2014 WL 1286392, at *10 (S.D. Cal. Mar. 28, 2014), the court permitted the testimony of two claims-handling experts. One of the experts opined about the insurer's failure to conduct a reasonable investigation, and further opined that the insurer acted maliciously with the intent to harm. The second expert described the flaws in the insurer's investigation, including its misclassifying of the claim, and opined that the insurer acted in bad faith in failing to pay benefits due. In permitting the experts' testimony, the court predicted that such testimony would assist the jury to understand best practices in handling fidelity insurance claims. This rationale directly ties considerations of helpfulness with considerations of impermissible conclusions. The court permitted the testimony of both experts because they did not cross the "thin line" between custom and practice and their *applicability*. The court suggested that the exclusion or admissibility of an expert may "depend[ ] upon how the expert expresses his opinion." The court also found that the expert's reference to applicable law did not render his opinion a legal conclusion. The court explained that "a witness [may] properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." ■